IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 348

CURTIS D. MacDOUGALL, et al.,
Plaintiffs-Appellants,

vs.

DWIGHT H. GREEN, Individually and as Governor of the State of Illinois, et al.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF AND ARGUMENT OF THE APPELLEES, MICHAEL J. FLYNN, Individually and as County Clerk of Cook County, Illinois, and THE BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO AND COMMISSIONERS thereof, Individually and as such COMMISSIONERS.

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- [ ] CHARLES L. ENGSTROM
- [ ] DR. W. L. CRAWFORD

- [ ] REGINA ETHEL RUYLE
- [ ] BOSS E. PRICE

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- [ ] WILLIAM L. DAWSON

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- [ ] JOHN S. BOYLE

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- [ ] MALACHY J. COGHLAN

FOR RECORDER OF DEEDS OF THE COUNTY OF COOK

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- [ ] SAM PARKS
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SUMMARIZED STATEMENT OF THE MATTERS INVOLVED.

On or about August 16, 1948 a nominating petition was filed by and on behalf of The Progressive Party and its candidates, in the office of the Secretary of State of the State of Illinois. Thereafter, and within the statutory period, certain legal voters of the State of Illinois filed objections to said nominating petition as provided for under Article 10 of the Illinois Election Code (ch. 46, Ill.

Rev. Stats., 1947). Subsequently, the Illinois State Officers Electoral Board was duly convened under that Election Code for the statutory purpose of hearing and passing upon the objections to the nominating petitions filed by The Progressive Party. The Board consisted of two Justices of the Supreme Court of Illinois and the Auditor of Public Accounts of the State of Illinois.

At the hearings before the Board the objectors appeared by counsel and the candidates of The Progressive Party appeared by counsel. Witnesses were sworn, evidence received and testimony duly taken. Thereafter, the Board ruled that the nominating petition filed on behalf of The Progressive Party candidates did not include the signatures of 200 qualified voters from each of at least 50 counties within the State as required by statute for the nomination of said candidates, and therefore, the purported petition of The Progressive Party was not sufficient in law to entitle the said candidates' names to appear on the ballot.

Thereafter, The Progressive Party moved for leave to file petitions for mandamus in the Supreme Court of Illinois. Such leave was sought by two motions, both of which were denied.

The Progressive Party subsequently filed the complaint in this case, commencing the action in the District Court of the United States for the Northern District of Illinois under Section 2201 of the Declaratory Judgment Act (Title 28, c. 151 U. S. Code, effective September 1, 1948.)

The allegations contained in the complaint for declaratory judgment and injunctive relief can be crystallized into two propositions:

1. The 1935 amendment to Section 2 of Article 10 of the Illinois Election Code is allegedly unconstitutional.

2. Even if the constitutionality of the aforesaid provision is upheld the Illinois State Officers Electoral Board erred in its interpretation of Section 4 of Article 10 of the Illinois Code. (This being the so-called "alternative issue.")

There are no allegations, in said complaint contained, showing that these appellees can act without authority from the Illinois State Officers Electoral Board. The pleadings contain no allegations whatever that the appellees have any duty to act, or could legally act, with regard to appellants' candidacies under the final decision of said Board. There are no allegations concerning appellees' authority to perform any acts, of any nature whatsoever, on behalf of appellants' candidates. Said complaint does not show on its face that these appellees have any legal interest herein. Nor is it apparent from the face of the complaint that the interests (if any) of appellants and appellees are conflicting. The complaint does not show any legal relation between appellants and these appellees.

A statutory three-judge court composed of Judges Kerner (of the Circuit Court of Appeals), Sullivan (of the District Court) and Igoe (of the District Court) was convened pursuant to Section 2281 of the New Judicial Code because interlocutory injunction was prayed.

The appellees (hereinafter described) appeared by counsel, and resisted the plaintiffs' motion for an interlocutory injunction. Counsel for the appellees argued and submitted briefs in support of their opposition to the motion. Appellants appeared by counsel, argued and submitted briefs. American Civil Liberties Union was allowed to file its brief *amicus curiae*.

After hearing the arguments of counsel and considering the briefs of the parties and of *amicus curiae* the court dismissed the verified complaint.

Findings of Fact and Conclusions of Law Below.

The statutory three-judge court entered Findings of Fact and Conclusions of Law, a copy of which is appended to this brief as EXHIBIT A.

Appellants.

The appellants have described themselves in paragraphs numbered three (3) to twelve (12) inclusive, (Pages 1-2, Complaint) as citizens and various Progressive Party candidates for different offices. The Progressive Party is also named as an appellant.

Appellees.

This brief and argument is submitted on behalf of Michael J. Flynn, Individually and as County Clerk of Cook County, Illinois, The Board of Election Commissioners of the City of Chicago and Harry A. Lipsky, Individually and as Chairman of, and William B. Daly and Mabel Reinecke, Individually and as Commissioners of The Board of Election Commissioners of the City of Chicago. Being those who, of the hundred odd appellees, named herein, appeared and argued below.

Briefs and Arguments of Appellants and the Attorney General of the State of Illinois.

By order of this Court briefs are due on Saturday, October 16, 1948. Since that order was entered, October 13, 1948, none of the parties have been able to examine each others briefs. We therefore, wish to point out that we, as well as the other parties, have been unable to reply to the several briefs to be filed herein. Lack of such reply is not intended as a waiver of any points.

Statement Opposing Jurisdiction.

Appellants motion to advance and expedite hearing of this case having been granted October 13, 1948 did not give appellees sufficient time within which to prepare their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm. Not having done so, is not intended to be a waiver of any contentions that would have been set forth on such pleadings. This brief and argument contains virtually the same matters.

Grounds on Which Appellees Opposed the Motion for Interlocutory Injunction.

These defendants resisted the Motion for injunctive relief on the following grounds, which were also a challenge of the District Courts' jurisdiction of the subject-matter. We argue these contentions in the Argument portion hereinafter contained.

1. Appellants, by their Complaint, undertake to invoke the aid of the Court to prescribe the method by which to conduct general elections in the State of Illinois, although the Congress of the United States has left the regulations and conduct of general elections to the several states.

2. There is no actual controversy between the parties to this action which will give the Court jurisdiction to grant the declaratory and injunctive relief prayed for in the motion and complaint.

3. The only relief demanded in the Complaint is of a political nature and an Equity Court has no jurisdiction over a suit to protect allegedly invaded political rights.

4. Relief can only be granted under the Federal Declaratory Judgment Act, in question, when an actual controversy between the parties exists.

5. The 1935 Amendment to Section 2 of Article 1 Illinois Election Code (Sec. 10-2, Ch. 46, Ill. Rev. Stat 1947) pleaded by appellants is not so clearly repugnant t nor in violation of, any provision of the Constitution of th United States as to warrant the granting of an interloc tory injunction.

6. The Complaint is in the nature of a "pseudo" appe from the decision of the Illinois State Officers Elector Board and the Court does not have jurisdiction to revie the decision of said Board, nor can it inquire into or exar ine its findings and rulings for error or any other purpose

7. The Court is without power to grant declarator relief or injunctive relief predicated thereupon, or in a ticipation of such declaratory relief, in the absence of a actual controversy within the meaning and purview of th new Federal Declaratory Judgment Act. (Sec. 2201, C 151, Title 28, U. S. Code, September 1, 1948.)

8. Appellants have failed to show any substantial clai of unconstitutionality of the Illinois statute. Therefor their complaint and motion for an interlocutory injunctio are wholly without merit.

9. The complaint and memorandum of law demonstra that the alleged federal question is without substanc therefore the Complaint and motion for an interlocuto injunction should be dismissed and denied.

10. The findings and decision of the Illinois State Of cers Electoral Board is not before the Court. Nor ca this Court rule upon the propriety or correctness of sai Board's interpretation of Illinois Law.

The following points and authorities are offered in sup port of the foregoing contentions and are relied upon fo affirmance of the order, and judgment below, denying th motion for interlocutory injunction and dismissing th complaint.

POINTS AND AUTHORITIES.

I.

THE ISSUES INVOLVED ARE OF A PECULIARLY POLITICAL NATURE, THEREFORE NOT MEET FOR JUDICIAL DETERMINATION.

A.

The subject matter is not of equitable cognizance.

Colegrove v. *Green*, 328 U. S. 549.
Guaranty Trust Co. v. *New York*, 326 U. S. 99.
Great Lakes v. *Huffman*, 319 U. S. 293.
Railroad Commission v. *Pullman Co.*, 312 U. S. 496.
Giles v. *Harris*, 189 U. S. 475.
United States v. *Reese*, 92 U. S. 215.
Minor v. *Happersett*, 21 Wall. 162.
Green v. *Mills* (C.C.A.), 69 F. Supp. 852.
Turman v. *Duckworth*, 68 F. Supp. 744.
Blackman v. *Stone*, 17 F. Supp. 102.
Sections 9 and 10 of Article 10, Illinois Election Code (pars. 9-10, 10-10, ch. 46, Ill. Rev. Stat., 1947).

II.

THE CASE BELOW WAS A PROCEEDING "DE NOVO". FURTHERMORE, DECISIONS OF THE ILLINOIS STATE OFFICERS ELECTORAL BOARD ARE FINAL.

See Argument.

A.

The Declaratory Judgment Act is a remedy only and does not create substantive rights.

Aralac, Inc. v. *Hat Corporation of America*, 166 F. (2d) 296.

Borchard, Declaratory Judgments, 2d Edition, Page 233.

B.

Neither the Illinois State Officers Electoral Board nor the Supreme Court of Illinois construed the state or federal constitutions on the issues urged here. Appellants did not at any time raise constitutional questions before said Board.

See Argument.

III.

THE COURT IS WITHOUT POWER TO GRANT DECLARATORY RELIEF IN THE ABSENCE OF "ACTUAL CONTROVERSY" WITHIN THE MEANING OF THE NEW DECLARATORY JUDGMENT ACT.

A.

The interests of appellants and appellees are not conflicting: these appellees are without legal interest in the issues.

Chapter 151, Title 28, U. S. Code (effective Sept. 1, 1948).

Section 10 of Article 10, Ill. Election Code (Ill. Rev. Stat., 1947, ch. 46, par. 10-10).

Aralac, Inc. v. *Hat Corporation of America*, 166 F. (2d) 286.

IV.

THE CONSTITUTIONALITY OF THE 1935 AMENDMENT TO SECTION 2, OF ARTICLE 10, ILLINOIS ELECTION CODE IS NOW A MOOT QUESTION.

See Argument.

V.

IT IS THE DUTY OF COURTS TO SO CONSTRUE ACTS OF LEGISLATURE AS TO UPHOLD THEIR CONSTITUTIONALITY AND VALIDITY IF IT CAN BE DONE, AND TO AUTHORIZE A COURT TO HOLD A LAW UNCONSTITUTIONAL. ITS REPUGNANCE TO THE ORGANIC LAW MUST CLEARLY APPEAR.

Mutual Film Co. v. *Industrial Commission of Ohio*, 215 Fed. Rep. 138.

A.

Appellants failed to show any substantial claim of unconstitutionality.

United Drug Co. v. *Graves, Governor of Ala.*, 34 F. (2d) 808.

ARGUMENT.

I.

THE ISSUES HERE INVOLVED ARE OF A PECULIARLY POLITICAL NATURE, THEREFORE NOT MEET FOR JUDICIAL DETERMINATION.*

A.

The subject matter is not of equitable cognizance.

This case does not involve a criminal statute about a political matter, not a statutory right of action for damages. Hence, it does not fit in certain specific legal compartments labeled by prior decisions of this Court. The right to vote is not involved here on the usual level of inquiry.

Appellants, here, are not claiming jurisdiction because of diversity of citizenship and amount in controversy, they rely solely upon purported violation of several provisions of the United States Constitution. (Paragraphs 37, 38, Page 9, Complaint.)

The Constitution of the United States does not confer the right of suffrage upon anyone. *Minor* v. *Happersett*, 21 Wall. 162, 22 L. Ed. 627.

Guaranty against discrimination on account of race, color or previous condition of servitude is the only new constitutional right vested in citizens of the United States by the 14th and 15th Amendments. *United States* v. *Reese*, 92 U. S. 214, 23 L. Ed. 563.

Stripped of verbiage, appellants' basic contention is that

* *Colegrove* v. *Green*, 328 U. S. 549, infra.

the Constitution of the United States requires the signature of each voter to carry equal force with that of every other voter, or that all voters' signatures should be equally effective, one with the other. And, therefore, the Illinois Election Code (Ill. Rev. Stat., 1947, Ch. 46, Sec. 10-2) signature requirement violates certain provisions of the United States Constitution.

That is the core of the case upon which appellants proceed for equitable relief.

That equity cannot interfere with elections or intervene in political matters is fundamental. Even invocation of the Civil Rights Act will not supply a patent deficiency in cases of this type.

The case of *Giles* v. *Harris*, 189 U. S. 475, involved equitable relief under the Civil Rights Act, and this Court, speaking through Mr. Justice Holmes, there said, at page 486:

> "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of § 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. *Green* v. *Mills*, 69 Fed. Rep. 852. • • •".

The cases of *Turman* v. *Duckworth*, 68 F. Supp. 744, and *Blackman* v. *Stone*, 17 F. Supp. 102, although not authoritative in this Court, reflect a line of decisions which explore the prevailing rule regarding equity's interference in matters of this nature.

We quote pertinent language from those two cases, not as controlling in this Court, but as more apt and skilled illustrations of the proposition urged by us.*

"Equitable relief in a federal court," this Court said in *Guaranty Trust Company* v. *New York*, 326 U. S. 99, "is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery."

In *Great Lakes* v. *Huffman*, 319 U. S. 293, this Court said:

> "The Declaratory Judgments Act was not devised to deprive Courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles."

In the course of the opinion delivered by Mr. Justice Holmes, in *Giles* v. *Harris*, 189 U. S. 475, the following appears at page 486:

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*In *Turman* v. *Duckworth*, 68 Federal Sup. 744, cited above, the Circuit Court of Appeals, Atlanta Division, said at page 748:

"Our system of government, State and federal, has never sought or demanded that each voter should have equal voting influence, though that might seem an ideal of democracy. In our federal government under its Constitution each State has in the Senate two 'unit votes,' wholly regardless of population, in the making of all laws, and in conforming treaties and appointments to federal offices. These unit votes also appear in the electoral college in choosing a president, so that there have been presidents who did not receive a majority of the popular votes. The people of the District of Columbia have no vote in their government but are ruled by a Congress elected wholly by others. Touching nominations, all the great political parties in their State and national organizations have followed in their nominating conventions the legislative strength of the States or counties represented, thinking that not to be irrational . . ."

Appeal to this Court dismissed. 329 U. S. 675. (See also 330 U. S. 804.)

The case of *Blackman, et al.* v. *Stone, et al.* (1936), 17 F. Supp. 102, involved a suit in equity to enjoin certain County Clerks of different Illinois counties, from printing ballots for the election of November 3, 1936, without including thereon the names of candidates designated in plaintiff's petition. In discussing the facts the court said at page 102:

"* * * if we narrow the statement of facts to the fundamental basic questions, it appears that a petition containing over 25,000

"The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. * * *"

Appellants argued extensively regarding *Colegrove* v. *Green* (June 10, 1946, 328 U. S. 549, aff'g. (N.D. Ill. 1946) 64 Fed. Supp. 632, reh'g. den., October 28, 1946) which indicates the great apprehension on their part regarding the obvious weight of that case against their position here.

There this Court dismissed a bill for a declaratory judgment presented by a qualified voter protesting the validity of the apportionment of Illinois into Congressional Districts.

The *Colegrove* case was an appeal from a decree of a District Court of three judges (64 F. Supp. 632) which dismissed the complaint in a suit to restrain state officers from acting pursuant to provisions of a state election law alleged to be invalid under the Federal Constitution. Mr. Justice Frankfurter announced the judgment of the Court. At page 552 (of the majority opinion) it was said:

"In effect this is an appeal to the federal courts *to reconstruct the electoral process* of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois." (Emphasis added.)

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names was filed with the Secretary of State asking that certain individuals named thereon be placed on the ballot as * * * candidates for State and Federal offices; that the plaintiffs represented more than fifty counties and that over 200 such signatures representing electors of each of fifty different counties * * *."

Thereafter, the State Officers Electoral Board held its hearing pursuant to Statute. The court continues:

"At said meeting the candidates made a limited appearance and objected to the jurisdiction of the three justices of the Supreme Court to pass upon the so-called objections. The three justices held that they had jurisdiction and would hear the objections and they demanded that the petition was insufficient."

The aforesaid certainly rings a familiar note in the Complaint here. For in paragraph 32 (Page 7, Complaint) appellants say:

> "The said provision of Section 2 of Article 10 of the Illinois Election Code added by amendment in 1935, in view of the marked disparity in the population of the 102 counties of the State of Illinois, is unconstitutional * * *."

The majority opinion in the *Colegrove* case also states, at pages 553-4:

> "It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest *be dressed up in the abstract phrases of the law.*" (Emphasis added.)

In our opinion *Colegrove* v. *Green* imposes rather stringent limitations on the availability of declaratory relief in constitutional litigation.

At this point, we cannot refrain from commenting that George F. Barrett, Attorney General of the State of Illinois, represented the appellee, as he does here. In that case (*Colegrove*) the Attorney General of the State of Illinois contended that a federal court of equity was without jurisdiction to *interfere by injunction or otherwise with an election or other purely political question.*

The Court then said at page 103:

"A study of the authorities leaves us in no doubt as to the soundness of the defendants' second proposition, viz., that courts of equity do not assume jurisdiction of suits to protect invaded *political* rights.

"In Ruling Case Law, volume 10, page 342, we find the following statement:

" 'Matters of a political character are also outside the pale of a court of equity, no such jurisdiction having ever been conceded to a chancery court, either in a federal or state judiciary, unless it is so provided expressly or impliedly by organic or statute laws. The political rights of a citizen are so sacred as are his rights, to personal liberty or property, but he must go to a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers, and on an ex parte hearing. Neither in England nor America has this power been suffered to extend to political affairs.' "

Mr. Justice Rutledge concurred with the majority of this Court in *Colegrove* v. *Green*, 328 U. S. 549, and in his separate opinion said:

> "If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights in important ways by vesting large measures of control in the political subdivisions of the Government and the State. *There is not, and could not be except abstractly, a right of absolute equality in voting.* And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution." (Emphasis added.)

And the Justice continues as follows:

> "I think, therefore, the case is one in which the Court may properly, *and should decline to exercise its jurisdiction.* Accordingly, the judgment should be affirmed and I join in that disposition of the cause." (Emphasis added.)

As the Court well knows *Colegrove* v. *Green*, 328 U. S. 549, was finally disposed of at its October term 1946 (No. 1031). The decision *Per Curiam* appears in 330 U. S. as follows:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. In view of the Court's refusal to grant rehearing in

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And at page 108:

"From a reading of the decisions and the treatises dealing with political and civil rights, we conclude the instant case involves no fact which makes the right to have a name on the ballot a civil right. It is not and can not be successfully argued that any right guaranteed by the Fourteenth Amendment is denied or abridged on 'account of race, color, or previous condition of servitude.' No right here alleged to have been invaded is a civil right. Whether the Supreme Court of Illinois was justified in going so far as to say that in all the cases 'The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate' we need not decide. We do not think that court had in mind a right to vote denied because of color. But, regardless of such limitation, we say there is no civil right here asserted. *The*

Colegrove v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, 828, and its dismissal of the appeals in *Cook* v. *Fortson* and *Turman* v. *Duckworth*, 329 U. S. 675, rehearing denied, 329 U. S. 829, Mr. Justice Rutledge concurs in the dismissal of this appeal. Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy are of the opinion that probable jurisdiction should be noted. • • •"

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Appellants here contend that Section 2 reduces the effectiveness of their votes and that they are deprived of their right to nominate and vote for candidates of their own choice.

It can readily be perceived that it is not the inherent qualities of Section 2 that directly affects their right to vote. It was the failure to have the requisite *valid* signatures of qualified votes that precipitated appellants' present situation.

A nominating petition containing the requisite number of *VALID* signatures would have qualified the candidates of the Progressive Party. Appellants do not attack the requirement of voters' signatures on nominating petitions, but the number of these required from certain locations. They raise no question that voters' signatures should not be required to nominate a candidate. The fault, they say,

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only right is the one to have a candidate's name appear on the ballot in the face of an adverse ruling of a duly created election board, the decision of which body not being based on the protected right described in the Fourteenth Amendment. (Emphasis added.)

"The machinery of election which the state has provided and which it had the constitutional right to provide has made no distinctions between individuals or persons. It has given to all citizens of Illinois the right to file petitions or to nominate by convention. It has set up machinery which is in every respect reasonable and in no way arbitrary whereby the validity of proceedings by petition may be determined and it has made the body thus created to pass upon the validity of such petitions (in this case the three senior justices of the Supreme Court of Illinois) the *final* arbiter of the validity of such proceedings (sections 10a-10c of the act Smith-Hurd Ill. Stat. c. 46 §§ 298a-298c). Final authority must rest somewhere. The State of Illinois through its legislature may legiti-

lies in where one has to go to get signatures (par. 48, page 12). It is the "leg-work" that is unconstitutional.

Plainly speaking, then, we are faced here with contentions urged solely because appellants found it too late to go back and get valid signatures from the counties where they lost signatures (or failed to get valid ones in the first instance).

That is the real point here. It is disguised in the "Alternative Issue" (Pages 1, 12, Complaint). Well knowing there is no appeal from an Illinois Electoral Board, the Progressive Party has urged that Section 2 of Article 10 certainly ought to be unconstitutional so that the Court will supply the deficiency by voiding the signature provision altogether.

None of the allegedly "unfortunate" counties described in paragraphs 33, 34, 35 (Page 8 of the Complaint) are parties to this action. Appellants seek to complain for them.

If the lower court had granted the interlocutory relief prayed for in appellants' motion for interlocutory injunction, then the appellees would be enjoined "from continuing to abstain from certifying" to the Appellee County Clerks

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mately determine how those final arbitrators shall be chosen as well as the qualifications of its members. The judgment of this board may be erroneous; but unless it acted outside its jurisdiction, *its judgment is final and binding.* Its judgment can not be successfully challenged because the challenger believes it acted unwisely or erroneously." (Emphasis added.)

This opinion concludes at page 110, with this language:

"In view of the lack of jurisdiction of this court to grant the relief sought, it is unnecessary and improper to consider plaintiffs' grounds of attack on the action of the Electoral Board. They assert the Electoral Board was without jurisdiction to rule on their petition because the notices required by the statute were not given and because there was no objection to their petition. Defendants take issue with plaintiffs on these points, but we find ourselves without authority to investigate and determine these controverted issues in any equity suit."

The decision was affirmed by the Circuit Court of Appeals (7th Circuit), on other grounds in 101 F. (2d) 500.

the names of the Progressive Party candidates; the Appellee Board of Election Commissioners would be enjoined "from continuing to abstain from printing or causing to have printed on the official ballots for use at the November 2, 1948 general election the names of the candidates originally nominated by the Progressive Party nominating petition."

Such relief would have voided the decision of the Illinois State Board. There being no appeal from that Board it would be completely improper for any court so to do. It should be noted there are no allegations of fraud or claim of any abuse of discretion on the part of the Board. What is truly attempted, here, is to strike down the decision of a lawfully constituted Board, acting under and pursuant to the Statutes of Illinois. Appellants would have this Court, or the lower court, simply eliminate and obliterate the Illinois Board by injunction.

This would be government by injunction and nomination by judicial fiat.

The statute creating and governing the Illinois State Officers Electoral Board (Pars. 10-9, 10-10, ch. 46, Ill. Rev. Stat., 1947) has not been challenged in this proceeding, nor has the authority of the Board been put into issue. The Complaint (Page 11) does set up an "alternative issue" contending that the Electoral Board *erred* in its interpretation of Sec. 4 of Article 10 (Par. 10-4, ch. 46, Ill. Rev. Stat., 1947). But, that is not a matter that could be reviewed in a Declaratory Judgment proceeding.

These appellees would be powerless in face of such an injunction. Each must receive a certification of nomination before he is empowered to act under the Illinois Election Code. Who will certify to them? The Electoral Board cannot be required to reconvene and issue a new decision

(injunctive relief has not been prayed for against that Board).

The real point in the case is that the Progressive Party prepared nominating petitions under Sec. 2 of Article 10, of the Illinois Election Code. Then, when objections to their petition prevailed and reduced the number of signatures, the Progressive Party decided such signature requirement to be conveniently unconstitutional.

The foregoing is predicated upon paragraphs 26, 27, 32 and 48 of the Complaint (Pages 6, 7, 48).

In *Giles* v. *Harris*, 189 U. S. 475, already cited, at 488, Mr. Justice Holmes said:

> "The Circuit Court has no power to bind the State. * * * Unless we are prepared to supervise the voting in that State. * * * it seems to us that all that the Plaintiffs could get from equity would be an empty form."

The Justice declared that if a decree could bind election officials, it would bind the State in violation of sovereign immunity.

In *Giles* v. *Harris*, 189 U. S. 475, this Court approved the decision in *Green* v. *Mills* (C.C.A.), 69 F. 852. The *Green* case contains the following:

> "It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. * * *"

The power of the State legislature to create and define districts for the election of representatives in Congress is confined by Section 4, Article I of the Federal Constitu-

tion. It is well established that in absence of regulations by Congress, the exercise of the power conferred upon State legislatures by Section 4 of Article I of the Federal Constitution is not restricted by requiring the duty to be performed in any particular manner.

Appellants' urge is that there is a federal requirement of "equality in voting power" that must be adhered to by the Election Code of Illinois. Whatever courts or judges may think of the propriety, advantage or necessity of imposing such a requirement, the question is one with which they are not concerned, because it is beyond the scope of their power or authority. The wisdom, propriety or expediency of a legislative act is exclusively a question for the law-making branch of the government to determine, and a court will not declare a statute invalid because in its judgment the measure may be unwise or detrimental to the best interests of the State. Constitutional limitations afford the only test by which the validity of a statute may be determined.

The right of the State of Illinois to fix the times, places and manner of holding elections for representatives and senators in Congress has not been altered or limited in any respect here pertinent by Congress.

In the case of *Railroad Commission* v. *Pullman Company*, 312 U. S. 496, 500, this Court said:

> "An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the exercise of the sound discretion, which guides the determination of courts of equity.' *Beal* v. *Missouri Pacific R. Co.*, *ante*, p. 45. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. • • • (cases collected) • • • Few public interests have a higher claim upon the

discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, *Pennsylvania* v. *Williams*, 294 U. S. 176; *or the final authority of a state court to interpret doubtful regulatory laws* of the state, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159; cf. *Hawks* v. *Hamill*, 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. • • •" (Emphasis added.)

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of states." from *Great Lakes* v. *Huffman*, 319 U. S. 293, *supra*.

• • • • • • •

"The printing of Illinois ballots is now in progress in Illinois' 102 counties. The deadline for printing absentee ballots has already passed" • • •

quoted from Page 2 of Appellants' Motion to advance and expedite this hearing.

In addition to that, we add that the Court will take judicial notice that millions of ballots are required for Cook County, Illinois, alone. In light of this factual situation we recall, and requote, that "the history of equity jurisdiction is the *history of regard for public consequences in employing the extraordinary remedy of the injunction.*" (*Railroad Commission* case, *supra*, 213 U. S. 496, 500.) Injunctive relief here would indeed precipitate serious public consequences.

II.

THE CASE BELOW WAS A PROCEEDING "DE NOVO". FURTHERMORE, DECISIONS OF THE ILLINOIS STATE OFFICERS ELECTORAL BOARD ARE FINAL.

The "Alternative issue" (Paragraphs 44 to 50 of the Complaint, pages 11 to 13), urged by the appellants, is, in essence, an attempt to obtain a review of the decision of the Illinois State Officers Electoral Board.

We submit this point requires little argument since paragraph 44 (Complaint, page 11) alleges, in substance, "that *even if* the constitutionality of the said provision of Section 2 of Article 10 of the Illinois Election *should be upheld, the State Officers Electoral Board erred in its interpretation of Section 4 of Article 10* of the Illinois Election Code thereby erroneously barring the Progressive Party candidates. * * *" (Emphasis added.)

Such pleading is tantamount to saying if this Court holds the pertinent amendment of Section 2 of Article 10 (Illinois Election Code) constitutional then the decision of the Illinois Electoral Board was in error. We say, even if that Board erred (which we do not admit) this Court cannot review its decision of August 31, 1948 (par. 28, Complaint, page 6).

All decisions of the State Officers Electoral Board are "final" (quoted from Sec. 10, Article 10, Ill. Rev. Stats., 1947) and certainly not subject to any review in the mode and manner pursued by appellants either in the court below or here. The Illinois Election Code does not provide for an appeal from the Board's decision.

But, for the purpose of argument (and not waiving any of our rights by so doing), we say that the appellants have

never raised any objections to the Illinois State Officers Electoral Board nor did appellants raise any constitutional questions before said Board.

The foregoing is borne out by the decision of said Electoral Board, dated August 31, 1948, wherein it is recited in paragraph two (2) thereof as follows:

> "That the said objectors and said Progressive Party and the members thereof appeared on the 26th day of August, 1948, before the Electoral Board as *legally constituted* and *no objection* was made as to the qualifications of the members thereof and that this Electoral Board had *jurisdiction* of the *parties* and of the *proceeding* and of the *subject matter.*" (Emphasis added.)

That finding is set forth on Page 31 of the Complaint filed herein, and so presented by appellants as Exhibit D in their Complaint. It also appears in our Exhibit A—the findings of fact and conclusions of the three-judge court below.

Furthermore, appellants do not urge, either in their Complaint or in oral arguments of counsel, that the Electoral Board did not have jurisdiction of the parties or subject matter, nor that its members were not properly qualified. The sole allegation urged is that the Board erred in "interpreting" the pertinent statutory section. Such matters cannot be considered by this Court, nor could they have been considered by the District Court.

A.

The Declaratory Judgment Act is a remedy only and does not create substantive rights.

The case of *Aralac, Inc.* v. *Hat Corporation of America*, 166 F. 2d 296, cites decisions of this Court as authority for the following propositions:

> "'The requirements of case or controversy are of

course no less strict under the Declaratory Judgment Act * * * than in case of other suits.' *Altvater v. Freeman*, 319 U. S. 359, at page 363, 63 S. Ct. 1115, 1118, 87 L. Ed. 1450", (Page 290).

And at page 291 it was said as follows:

"'The operation of the Declaratory Judgment Act is *procedural* only.'" *Hughes, C. J., in Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240, 241, 57 S. Ct. 461, 463, 81 L. Ed. 617, 108 A.L.R. 1000.

"'It is an axiom that the Declaratory Judgment Act *has not enlarged the jurisdiction of the courts* over subject-matter and parties.'" Borchard Declaratory Judgments, 2d Ed., p. 233.

"The Act *created no new rights* but introduced an additional remedy of inestimable value. * * * *No new substantive rights* were however created. The controversy is the same as previously."

The *Aralac* case was decided February 10, 1948, and contains further appropriate authority. It stands for the proposition that mere averment that a case is brought under the Declaratory Judgment Act is not sufficient. (Cases collected under footnote 4, page 290, of that opinion.) Furthermore, the court must raise the objection (lack of controversy) of its own motion if it is not otherwise presented. (Authorities collected under footnote 4, page 290 of the Aralac opinion.)

There is no particular magic in appellants' choice of remedy. The Declaratory Judgment Act will not supply the deficiencies in their complaint. Appellants certainly can not obtain a review of the decision of the Illinois State Officers Electoral Board by a Declaratory Judgment proceeding. Nor will that remedy foster a constitutional issue when the complaint is barren of a true one.

* * * * * *

The chaos and confusion that would be caused by immediate injunctive relief, in this case, is readily apparent.

Studied consideration demonstrates that such sudden relief would complicate the status of the appellees under their respective statutory duties; election machinery would grind to a halt pending adjustments, directions, and such other appropriate steps as would be necessary and proper.

B.

Neither the Illinois State Officers Electoral Board nor the Supreme Court of Illinois construed the state or federal constitutions on the issues urged here. Appellants did not at any time raise constitutional questions before said Board.

The complaint is utterly devoid of any allegation showing that appellees objected to the State Electoral Board, or that the Progressive Party raised any constitutional questions in the proceedings before said Board. The Supreme Court of Illinois did not hand down any decision when the petition for mandamus was denied. (Par. 30, Complaint, page 7.)

Clearly, the ruling of the Board did not change Section 2 of Article 10, of the Illinois Election Code. It is only the Board's construction of its unequivocal meaning. The decision of the Electoral Board was not rendered on any constitutional issue or question. Obviously, it had no authority so to do even if such issues had been presented to it. The Board could only read and apply the appropriate provisions of the Election Code, and this it did.

III.

THE COURT IS WITHOUT POWER TO GRANT DECLARATORY RELIEF IN THE ABSENCE OF "ACTUAL CONTROVERSY" WITHIN THE MEANING OF THE NEW DECLARATORY JUDGMENT ACT.

A.

The interests of appellants and appellees are not conflicting: these appellees are without legal interest in the issues.

Appellants proceeded by way of a Declaratory Judgment coupled with injunctive relief, under Section 2201 of the new Judicial Code. (Chapter 151, Title 28, United States Code, effective September 1, 1948.) Section 2201 creates a remedy, and commences with this important phraseology:

"In a case of *actual controversy* • • •" (Emphasis added.)

We will not burden this Court with the appropriate citations bearing upon the requirements of "cases and controversies". Suffice, to say the aforesaid Section speaks for itself, and the cases we discuss develop the prime requisite of an "actual controversy" so as to invoke Federal Courts' jurisdiction in proceedings for a Declaratory Judgment.

It is of further importance to note that Section 2201 is based on title 28, U.S.C., 1940 ed., par. 400, so that our line of our authorities with reference to this Section is still appropriate under the newest Section 2201.

Professor Borchard, in his work on Declaratory Judgments (1941—2nd edition) points out at page 29, that "• • • the action must be adversary in character, that

is, there must be a controversy between the plaintiff and a defendant, subject to the court's jurisdiction, having an interest in opposing his claim. Unless the parties have such conflicting interests, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justifiable."

The State Officers Electoral Board, after a full hearing, announced its decision on August 31, 1948, finding that the Progressive Party was not entitled to have its candidates placed upon the ballots for use at the November 2, 1948 general election to be held in the State of Illinois. (Complaint, Page 6.) That Board has not been made a party to the proceedings before this Court. The Appellees have no duty toward the Appellants as a result of the aforesaid decision. In fact the Appellees are powerless to do otherwise. They have no discretion in the matter. Appellees can only place names of candidates upon a ballot as are duly and properly certified to them by virtue of the Illinois Election Code.

Section 10, of Article 10 of the Illinois Election Code (sec. 10-10, ch. 46, Ill. Rev. Stat., 1947) provides, among other things, as follows:

> "* * * the decision of a majority of the electoral board *shall be final.*" (Emphasis added)
>
> "Within twenty-four (24) hours after the electoral board has made its decision, it shall transmit, * * * a certified copy of its ruling, * * * to the officer or board with whom the certificate of nomination or nomination papers, as objected to, were on file, and such officer or board *shall abide by and comply with the ruling so made to all intents and purposes.*" (Emphasis added)

The Appellees in the case at bar are abiding by and complying with their respective statutory duties. They

cannot do otherwise. It would be manifestly impossible for them to legally print ballots with the names of those Progressive Party candidates as pleaded in the Complaint. Such action would be a violation of Appellees' statutory duties and obligations. Hence, the Appellees have no conflicting or adverse interests herein. They are legally devoid of interests conflicting, adverse or otherwise. There cannot be an "actual controversy" betwen Appellants and Appellees, since these appellee public officials are utterly powerless to controvert anything. They have a statutory duty to perform and it is not a discretionary one. There is no margin for anything other than strict performance.

This is borne out by Appellants' prayers (Complaint, Page 15) for a temporary injunction wherein each prayer asks that the Appellees be enjoined "*from continuing to abstain from certifying*" (Emphasis added) candidates of the Progressive Party. We say Appellees abstain from certifying these candidates or printing ballots because they are bound by the mandate of the General Assembly of the State of Illinois. The Illinois Election Code does not permit the Appellees any discretion in the matter here. They certify candidates who qualify under the Code and who are certified to them under the Illinois Election Code. They must print ballots bearing the names of legally qualified candidates. There the matter ends.

In *Aralac, Inc.* v. *Hat Corporation of America,* 166 F. 2d 286 (1948), the Circuit Court of Appeals, Third District, had before it an action for a declaratory judgment. At page 290, that court said,—citing a decision of this Court as its authority:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise

test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a *substantial controversy between the parties having adverse legal interests*, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. * * * *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, * * * 312 U. S. 273, 61 St. Ct. 512, 85 L. Ed. 826. See *Creamery Package Mfg. Co.* v. *Cherry-Burrell Corp.*, 3 Cir. 1940, 115 F. 2d, 980, 983." (Emphasis added.)

Footnote 4, on page 290 of the aforesaid opinion reads as follows:

"If there is no dispute or controversy within the jurisdiction of the court the court should not enter judgment on the merits but dismiss for want of jurisdiction. *Leaver* v. *Parker*, 9 Cir. 1941, 121, F. 2d 738."

"A 'controversy,' in the sense in which the word is used in the Constitution in defining the judicial power of the Federal courts, must be one that is appropriate for judicial determination as *distinguished* from a *difference* or *dispute* of a *hypothetical* or *abstract* character, or from one that is academic or moot; must be definite and concrete, touching the legal relations of parties having adverse legal interests; and must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion *advising* what the law would be upon a hypothetical state of facts."

Aetna Life Ins. Co. v. *Edwin P. Haworth et al.*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000.

In the case of *Mills* v. *Briggs Green*, 159 U. S. 651, 16 S. Ct. 132, 133, 40 L. Ed. 293, it was held:

"The duty of this court as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinion upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

IV.

THE CONSTITUTIONALITY OF THE 1935 AMENDMENT TO SECTION 2, OF ARTICLE 10, ILLINOIS ELECTION CODE IS NOW A MOOT QUESTION.

Appellants proceeded before the Illinois State Officers Electoral Board without interposing any defense, whatsoever, pertaining to the validity of Section 2 of Article 10 (Sec. 10-2, ch. 46, Ill. Rev. Stat., 1947). They did not challenge the constitutionality of Section 2 in the hearing before the Board. Paragraph 2 of the Board's findings (Exhibit "D", pages 30-31 of the Complaint) substantiates this statement, wherein it reads, in part, as follows:

> "* * * that this Electoral Board has jurisdiction of the parties and of the proceeding and of the subject matter."

The Progressive Party was duly apprised of the nature and basis of that hearing on objections and the decision of the Board recites: "* * * all notices of the proceeding having been given as required by law, said hearing commenced on August 26, 1948."

Clearly then Appellants knew the signature requirement (they now complain of) under Section 2 of Article 10 was to be the basis of that hearing, yet they remained silent as to the constitutional aspects of that Article. And, it was not until the Board ruled that Appellants first questioned the validity of the 1935 Amendment to Section 2.

They should have objected to the Board's consideration of the case under Section 2, and sought relief at that time, under the Declaratory Judgments Act. In fact that is the ideal situation for a declaratory judgment proceeding.

It is too late now to turn back to the Board proceedings and plead the unconstitutionality of Article 2. The point

became moot after the Board ruled. More especially, since the Board is not a party to this cause and has no way of changing its decision. *The nominating petition, in question, expired with the ruling of the Board.* Injunctive relief cannot give it life.

Under the Illinois Election Code governing the State Officers Electoral Board (Sec. 10-10, ch. 46, Ill. Rev. Stat. 1947):

> "* * * The decision of a majority of the electoral board shall be final." (Emphasis added).

Hence, it appears that the complaint, filed herein, is an attempt to erase the findings of the Board by injunctive relief.

The Electoral Board was composed of officers of the State of Illinois. If relief, as sought herein, were to be granted it would not only amount to *coercing* the acts of various state officials, but go even deeper, by directing them to ignore the decision of a Board duly constituted under the statutes of Illinois.

V.

IT IS THE DUTY OF COURTS TO SO CONSTRUE ACTS OF A LEGISLATURE AS TO UPHOLD THEIR CONSTITUTIONALITY AND VALIDITY IF IT CAN BE DONE, AND TO AUTHORIZE A COURT TO HOLD A LAW UNCONSTITUTIONAL. ITS REPUGNANCE TO THE ORGANIC LAW MUST CLEARLY APPEAR.

It is a canon of statutory construction that a law will be construed, if possible, in such a way as to render it constitutional if it can be done.

Thus it was said in *Mutual Film Co. v. Industrial Commission of Ohio,* 215 Fed. Rep. 138, the following:

> "* * * the 'principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional unless it be plainly and palpably so.' *Booth* v. *Illinois*, * * * 184 U. S. at page 431, 22 Sup. Crt. at page 428 (46 L. Ed. 623). And, as Judge Donahue expressed the rule prevailing in Ohio: 'A court is not authorized to adjudge a statute unconstitutional where question of its constitutionality is at all doubtful.' *Board of Health* v. *Greenville*, * * * 86 Ohio St. at page 20, 98 N. E. at page 1021 * * *."

To further sustain our contention on the point we quote from *Federation of Labor* v. *McAdory*, 325 U. S. 450, 471:

> "As we have said, it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions * * *. Most courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional. * * *"

We have discussed this point since it is a prime factor for consideration prior to granting of injunctive relief. Giving the relief, prayed for here, would have had to have been predicated upon an ultimate finding of unconstitutionality.

Paragraph number 1 (Ex. A attached hereto), conclusions of the lower court, hold that Sec. 2, Article 10, Ill. Election Code "is not repugnant to, nor in violation of any provisions of the Constitution of the United States * * *" hence, its denial of the motion for interlocutory injunction was correct and without error.

So, in this case we urge that the interlocutory injunction should not be ordered, and the district court acted correctly. Moreover, such a preliminary injunction would work great injury to all other voters and election officials in the event the portion of Section 2, Article 10, complained of, is held to be constitutional.

The case before this Court involves the general election of November 2, 1948. It is apparent that a temporary injunction, as prayed for, would directly affect that election. Since the weight of authority has always been toward upholding constitutionality of statutes, unless clearly repugnant to organic law, we say Appellants have not yet made out a sufficient case of unconstitutionality to warrant such serious and far reaching injunctive relief, at the interlocutory state of proceedings had below.

A.

Appellants failed to show any substantial claim of unconstitutionality.

That the question of the unconstitutionality of a state statute must be a substantial one to warrant intervention of three judges in cases in which preliminary injunctions are sought to restrain enforcement of a state statute under Judicial Code, par. 266, amended, and in *United Drug Co.* v. *Graves, Governor of Alabama,* 34 F. 2d 808, at page 255, it was said:

> "In *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 391 we had occasion to observe that 'the three judge procedure is an extraordinary one, imposing a heavy burden on federal courts with attendant expense and delay;' • • • We concluded that 'when it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed.'' The court further said at page 255:
>
> "• • • although the bill of complaint had been previously filed, and a *motion for an interlocutory injunction presented,* it was apparent after our decisions in the cases cited that the federal question was without substance and it became the duty of the District Court to dismiss the bill on complaint of that ground.'' (Emphasis added). *Wylie et al.,* v.

State Board of Equalization of California, 21 F. Supp. 604 stands for the broad proposition that a "substantial claim of unconstitutionality must appear before" a three judge court will take jurisdiction under Federal statutes governing suits to enjoin enforcement, operation, or execution of a *state statute for the unconstitutionality* thereof, and, 'in the absence of such claim, even diversity of citizenships would not confer jurisdiction.' " (Collection of cases at page 605 of the opinion).

Appellants are, in essence, complaining about signature requirements prescribed by the legislature of the State of Illinois. The relief they seek would result in waiving those requirements for their benefit. They might well argue that only 199 signatures should be required from each of 50 counties or 201 signatures from 49 counties. We think this is a matter for legislative action and not appropriate for the judicial branch of the government.

SUMMARY.

The district court correctly ruled that it was "without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board * * *". Its other conclusion of law was that the provisions of Sec. 2 of Article 10, here complained of is not repugnant to, or in violation of any provisions of the Constitution of the United States nor does it contravene Sec. 18, Art. II of the Illinois Constitution. Thus, this latter conclusion of law sustains its reasons for denying the motion for interlocutory injunction.

The findings of fact by the district court dispose of the appellants' contentions. Especially paragraph 3 (page 2, Ex. A) that "No objection was made to the qualifications of the members thereof (the Board) or that the Electoral Board did not have jurisdiction of the parties,

of the proceedings, and of the subject matter." (Emphasis added.)

Failure by appellants to obtain the requisite valid signatures on their nominating petitions does not warrant destruction or reprinting of millions of ballots in Cook County, Illinois, nor vast numbers of ballots in the rest of the State of Illinois.

We say the three-judge court did not err in denying the motion for an interlocutory injunction.

Conclusion.

For the reasons urged in this brief, we respectfully submit that this Court should either dismiss this appeal or sustain and affirm the order and judgment appealed from the District Court.

Respectfully submitted,

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EXHIBIT "A"

DISTRICT COURT OF THE UNITED STATES
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Curtis D. MacDougall, et al.,
Plaintiffs,
v.
Dwight H. Green, Individually and as Governor of the State of Illinois, et al.,
Defendants.
No. 48 C 1406

Findings of Fact and Conclusions of Law.

This cause coming on to be heard on the Plaintiffs' verified complaint as amended and motion for an interlocutory injunction and the Court, having heard argument of counsel and having considered the briefs of the parties and of *amicus curiae* and being fully advised in the premises, does make and adopt the following findings of fact and conclusions of law;

Findings of Fact.

1. This is an action of a civil nature brought under Sec. 2201 of the Declaratory Judgment Act, 28, c. 151, United States Code, effective September 1, 1948.

2. The individual defendants are citizens and residents of the State of Illinois; they claim to be candidates of a new political party known as "The Progressive Party" for United States senator from the State of Illinois, Electors for president and vice president of the United States

from the State of Illinois and for certain public offices of the State of Illinois; they seek the entry of an interlocutory injunction that the defendants Dwight H. Green, Arthur C. Lueder and Edward J. Barrett, Governor, Auditor of Public Accounts, and Secretary of State of Illinois, respectively, be directed to certify to the respective county clerks of the State of Illinois, as the candidates of The Progressive Party, the names of the persons named in the complaint.

3. That on August 16, 1948 a declaration of intention to form a new State wide political party and a petition to nominate candidates for that party was filed by and on behalf of The Progressive Party pursuant to the provisions of Article 10 of the Illinois Election Code; said nominating petition, together with the statements of candidacy of the individual candidates, was presented to the Governor, the Auditor of Public Accounts, and the Secretary of State for the State of Illinois for endorsement and filed in the office of Secretary of State as required by law; That on August 21, 1948 certain legal voters of the State of Illinois filed objections to said nominating petition and thereafter on August 26, 1948 the State Officers Electoral Board, the body provided for by law to hear and pass upon objections to nominating petitions filed pursuant to Article 10 of the Illinois Election Code, convened in the Capitol Building in Springfield, Illinois. The objectors and the Progressive Party and the members thereof appeared before the Board. No objection was made to the qualifications of the members thereof or that the Electoral Board did not have jurisdiction of the parties, of the proceedings, and of the subject matter.

4. Said Board received evidence and heard arguments on behalf of the parties interested from August 26, 1948 to August 31, 1948, and on August 31 found as a fact "That

the nominating petition filed on behalf of the said candidates of The Progressive Party does not include the signatures of 200 qualified voters from each of at least 50 counties within this State as required by statute for the nomination of said candidates for such public office, and is therefor insufficient in law as a nominating petition," and that the purported petition was not sufficient in law to entitle the said candidates' name to appear on the ballot for use at November 2, 1948 general election.

Conclusions of Law.

1. The provisions of Sec. 2 of Article 10, (Sec. 10-2, c. 46, Ill. Rev. Stat. 1947), requiring for a valid nominating petition at least two hundred signatures of qualified voters from each of at least fifty counties is not repugnant to, nor in violation of any provisions of the Constitution of the United States, nor does it contravene Sec. 18, Article II of the Constitution of Illinois.

2. This Court is without jurisdiction to examine or inquire into the decision of the Illinois State Officers' Electoral Board of August 31, 1948 and to hold that the Board's decision is null and void.

3. The motion for the interlocutory injunction will be denied.

OTTO KERNER,
Judge U. S. Court of Appeals

PHILIP L. SULLIVAN,
Judge U. S. District Court

M. L. IGOE,
Judge U. S. District Court.